

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

Houlton Enterprises, Inc. d/b/a)	Application No. FC-1309
Guaranteed Phone Service,)	
)	
Complainant,)	COMPLAINT SUSTAINED IN PART
v.)	AND DENIED IN PART
)	
Qwest Corporation,)	
)	
Respondent.)	Entered: July 8, 2003

APPEARANCES:

For the Complainant:

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For the Respondent:

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For the Commission:

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BY THE COMMISSION:

B A C K G R O U N D

By Complaint filed on November 26, 2002, Houlton Enterprises, Inc., d/b/a Guaranteed Phone Service [hereinafter "Houlton"] seeks relief from retroactively billed charges from Qwest Corporation (f/k/a US West) and for improperly billed

nonrecurring charges for new phone service under their current resale agreement. An Answer to the Complaint was filed by Qwest on January 15, 2003. Qwest denied the allegations raised by the Complainant generally and denied that any relief was warranted. A hearing in this matter was held on March 17, 2003, after proper notice to both parties.

Houlton and Qwest had tentatively resolved the second issue pertaining to the nonrecurring charges for new installation and change in service. The Commission considers this issue settled and the filing of a new complaint with this Commission will be required to raise any dispute concerning this issue. Therefore, the Commission heard testimony only on the issue of the retroactively billed charges.

O P I N I O N A N D F I N D I N G S

Houlton is a competitive local exchange carrier primarily providing service currently by reselling Qwest phone service. Qwest is an incumbent local exchange carrier. The parties entered into a resale agreement that was approved by this Commission on August 25, 1998 [hereinafter referred to as the "Resale Agreement"] (Exhibit 2). Under its terms, the Resale Agreement was to terminate on December 1, 1999. The dispute between the parties concerned the "true-up" provision in the Resale Agreement which provided in pertinent part:

The rates for those resold services initially included in the wholesale pricing arrangement under this Agreement shall be subject to true-up to the wholesale discount rates established by a Commission Order, making such rates generally available to resellers or established by a resale tariff, retroactively to the effective date of this Agreement. Any true up shall be on a service-by-service basis if wholesale discount rates are established by a Commission on such a basis.

. . .

If a state Commission fails to issue such an Order or make effective such a tariff by the end of the first year of this Agreement, either USWC or Reseller may elect to renegotiate this Section of the Agreement.

The Resale Agreement also contained an internal limitation provision that limits the parties to a two-year period to bring a cause of action. (Ex. 2 at 19.) The Resale Agreement was scheduled to terminate in December of 1999. However, the parties agreed to another one-year period starting on December 1, 1999. (Transcript at 31:22-25.) On October 11, 2000, with the Resale Agreement scheduled to be terminated on December 1, 2000, Qwest offered to have the Resale Agreement become a month-to-month agreement. (Ex. 8.) Houlton accepted this offer. (Tr. at 31:22-25.) On June 7, 2002, the Commission's decision in Application No. C-2516¹, on Qwest's rates for interconnection and resale became effective. On September 10, 2002, Qwest billed Houlton for a true-up period of approximately four years. The true-up amount was calculated as the difference between the amount previously paid by Houlton to Qwest and the amount resulting from the application of the wholesale discount rate approved by the Commission in Application No. C-2516, to applicable retail rate elements. The amount billed included both credits and charges for the true-up period. (Ex. 9.) With the offsetting credits, Qwest claimed Houlton owed \$78,892.63 as a result of the four-year true-up process Qwest applied to all like resale carriers. The parties disagree as to the length of the true-up period and the charges subject to the true-up provisions.

When the Commission entered its order revising Qwest's prices for unbundled network elements and resale to competing interconnecting carriers, it did not address whether said rates were subject to true-up. Rather, the Commission remained silent on that issue because no true-up was requested by Qwest or addressed in the hearings by any other interested party. The Commission frowns on the true-up of prices because such a practice encourages uncertainty for competing carriers entering the state. It was established at the hearing on this Complaint that the Resale Agreement contained a true-up provision because of the Commission's order in the US West/AT&T arbitration.² The Commission's order contained the following language:

¹ *In the Matter of the Commission, on its own motion, to investigate cost studies to establish Qwest Corporation's rates for interconnection, unbundled network elements, transport and termination, and resale*, Application No. C-2516/PI-49, Findings and Conclusions (April 23, 2002) ["Application No. C-2516"].

² *See In the matter of AT&T Communications of the Midwest, Inc. of Denver, Colorado Petitioning for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with US West Communications, Inc.* Application No. C-1385, Interconnection Agreement Approved as Modified (July 1, 1997) ["Application No. C-1385"].

We further believe that a retroactive true-up should be implemented after the conclusion of C-1415 to correct any pricing errors. Since Docket C-1415 is pending at this time and we cannot accurately predict a completion date, we find it reasonable to limit the period to "true-up" rates in this proceeding retroactively to one year.

In that case, the Commission has previously found that the true-up for rates due to the findings contained in the Commission's cost docket should not be longer than one year. The Commission, through the express limitations provided in Application No. C-1385 did not intend to have an extended true-up period. It is also worth noting that although the resale agreement was a negotiated agreement, the wholesale discount rates appear to match those contained in the arbitrated US West/AT&T agreement.

That notwithstanding, the resale agreement at issue in this proceeding is a product of negotiation and was not adopted by 252(i). Moreover, the resale agreement before us contains different true-up language than the US West/AT&T agreement and does not expressly include the one-year true-up limitation that the US West/AT&T agreement contains. The language in the Resale Agreement did provide that the parties had the option to renegotiate the true-up time period after the expiration of one year. However, there is no written evidence that the parties did so when they extended the contract. Nor is there any evidence that any other modification was made other than the extension of the termination date.

Although the Resale Agreement was extended beyond the initial term, we do not find that the extension of the contract on a month-to-month basis limits Qwest to a one-month true-up term. Rather, the month-to-month term was an extension of the original agreement.

Qwest's position of a four-year true-up period is also illogical. Qwest testified that it did not have billing records prior to the year 2000. It therefore "estimated" the true-up charges and billed the estimated charges to Houlton. We find that Qwest's imposition of estimated true-up charges on Houlton for the time period in which it did not have billing records is unreasonable. We therefore, find that Qwest may pursue a true-up for the two-year period for which it has shown actual billing records to Houlton. Qwest may not use any estimated billing charges in its calculation of the true-up. Nor may Qwest use

any billing records found subsequent to the hearing to justify any further true-up.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the foregoing Opinion and Findings are hereby adopted.

MADE AND ENTERED at Lincoln, Nebraska, this 8th day of July, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director